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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-86072; File No. SR-NASDAQ-2019-039]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Rule 5615 to Allow Additional Issuers Who List Only Specific Securities to Be Able to Avail Themselves of Certain Exemptions Under Corporate Governance Requirements and to Amend Nasdaq Rule IM-5620 to Exclude Additional Categories of Issuers Listing Only Specific Securities from the Annual Shareholder Meeting Requirement**

June 10, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 28, 2019, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Nasdaq Rule 5615 to modify the exemptions available from certain corporate governance requirements, add similar exemptions for issuers of only non-voting preferred securities and debt securities, and add a definition of “Derivative Securities”.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Nasdaq also proposes to amend Nasdaq Rule IM-5620 to modify the exemptions from the annual meeting requirements in Nasdaq Rule 5620(a) to include issuers of only non-voting preferred securities and debt securities in such exemptions. In addition, as discussed below, the proposed exemptions from certain corporate governance and annual meeting requirements will also be available to securities included in the new definition of “Derivative Securities”. The Exchange notes that the proposed changes would result in rules that are substantially similar to the existing rules of the NYSE Arca, Inc. (“Arca”).<sup>3</sup>

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to (i) amend Nasdaq Rule 5615 (Exemptions from Certain Corporate Governance Requirements), which outlines the exemptions available from some of its corporate governance requirements for certain issuers, as well as to modify and expand the

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<sup>3</sup> See Arca Rule 5.3-E (Corporate Governance and Disclosure Policies).

exemptions available to issuers of certain securities; (ii) add a definition for “Derivative Securities” applicable only to the Nasdaq Rule 5600 Series; (iii) detail the exemptions available to issuers that only list non-voting preferred securities, debt securities, and Derivative Securities; and (iv) amend Nasdaq Rule IM-5620 to update the exemptions from the annual meeting requirements to include issuers that only list non-voting preferred securities, debt securities, and Derivative Securities. The Exchange notes that the proposed changes would result in rules that are substantially similar to the existing rules of Arca<sup>4</sup> and are supported by prior Commission approval orders<sup>5</sup> and immediately effective exchange proposals.<sup>6</sup> However while NextShares (Nasdaq Rule 5745) are included in the new definition for “Derivative Securities”, Arca rules do not include an equivalent product. But for the reasons discussed below, the Exchange believes that NextShares are entitled to the proposed exemptions because NextShares are similar to products listed pursuant to both Nasdaq and Arca rules.

Nasdaq Rule 5615 currently provides exemptions to issuers of certain securities listed pursuant to the Nasdaq Rule 5700 series from portions of the Nasdaq Rule 5600 series.<sup>7</sup> Nasdaq Rule 5615(a)(1) provides exemptions for asset-backed issuers<sup>8</sup> and other passive issuers<sup>9</sup> from

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<sup>4</sup> Id.

<sup>5</sup> See Securities Exchange Act Release No. 49810 (June 4, 2004), 69 FR 32647 (June 10, 2004) (SR-PCX-2003-35) (adopting the predecessor to Arca Rule 5.3-E), Securities Exchange Act Release No. 57268 (February 4, 2008), 73 FR 7614 (February 8, 2008) (SR-Amex-2006-31), and Securities Exchange Act Release No. 53578 (March 30, 2006), 71 FR 17532 (April 6, 2006) (SR-NASD-2005-073).

<sup>6</sup> See Securities Exchange Act Release No. 83324 (May 24, 2018), 83 FR 25076 (May 31, 2018) (SR-NYSEArca-2018-31).

<sup>7</sup> Nasdaq notes that Cooperative and Limited Partnerships are not listed pursuant to the Nasdaq Rule 5700 Series. Therefore, Nasdaq Rules 5615(a)(2) and 5615(a)(4) which describe the exemptions from the Nasdaq Rule 5600 series for Cooperatives and Limited Partnerships, respectively are not applicable to this filing.

<sup>8</sup> IM-5615-1 defines as issuers “that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity

the provisions of Nasdaq Rule 5605(b) (as related to the majority independent directors), Nasdaq Rule 5605(c) (Audit Committee Requirements), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), Nasdaq Rule 5610 (Code of Conduct), and Nasdaq Rule 5615(c)(2) (Controlled Company Exemption).

Nasdaq Rule 5615(a)(3) provides the parameters around which a Foreign Private Issuer may rely on home country practice in lieu of certain requirements of the Nasdaq Rule 5600 series. This rule also includes the disclosure requirements when an issuer chooses to follow home country practice. Certain products listed pursuant to the Nasdaq Rule 5700 Series are able to rely on Nasdaq Rule 5615(a)(3) as they are issued by Foreign Private Issuers.<sup>10</sup> Nasdaq Rule 5615(a)(5) provides exemptions for management investment companies registered under the Investment Company Act of 1940<sup>11</sup> from the provisions of Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), and Nasdaq Rule 5610 (Code of Conduct).

In addition, under Nasdaq Rule 5615(a)(5), management investment companies are exempt from Nasdaq Rule 5605(c) (Audit Committee Requirements), except for the provisions

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and whose activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral or other assets on behalf of or for the benefit of the holders of the listed securities.”

<sup>9</sup> Nasdaq Rule 5615(a)(1)(B) includes Portfolio Depositary Receipts as an example of a passive issuer.

<sup>10</sup> Currently, issuers of securities such as Linked Securities (Nasdaq Rule 5710) that are foreign private issuers and have a primary equity listing on either Nasdaq or the New York Stock Exchange are able to utilize the exemptions provided for in Nasdaq Rule 5615(a)(3).

<sup>11</sup> 15 U.S.C 80a.

of Rule 10A-3 of the Securities Exchange Act of 1934 (“SEC Rule 10A-3”).<sup>12</sup> Currently, products that can rely on the exemptions within Nasdaq Rule 5615(a)(5) are Index Fund Shares (Nasdaq Rule 5705(b)), Managed Fund Shares (Nasdaq Rule 5735) and NextShares (Nasdaq Rule 5745).

Nasdaq IM-5620 provides exemptions to issuers of certain securities listed pursuant to the requirements of Nasdaq Rule 5620(a) (Meetings of Shareholders). Currently, Portfolio Depositary Receipts (Nasdaq Rule 5705(a)), Index Fund Shares (Nasdaq Rule 5705(b)), and Trust Issued Receipts (Nasdaq Rule 5720) are exempt from the annual meeting requirements.<sup>13</sup>

Nasdaq proposes to add a definition of “Derivative Securities” to Nasdaq Rule 5615 (the “Proposed Definition”).<sup>14</sup> This definition will include Portfolio Depositary Receipts (Nasdaq Rule 5705(a)), Index Fund Shares (Nasdaq Rule 5705(b)), Equity Index-Linked Securities (Nasdaq Rule 5710(k)(i)), Commodity-Linked Securities (Nasdaq Rule 5710(k)(ii)), Fixed Income Index-Linked Securities (Nasdaq Rule 5710(k)(iii)), Futures-Linked Securities (Nasdaq Rule 5710(k)(iv)), Multifactor Index-Linked Securities (Nasdaq Rule 5710(k)(v)), Index-Linked Exchangeable Notes (Nasdaq Rule 5711(a)), Equity Gold Shares (Nasdaq Rule 5711(b)), Trust Certificates (Nasdaq Rule 5711(c)), Commodity-Based Trust Shares (Nasdaq Rule 5711(d)), Currency Trust Shares (Nasdaq Rule 5711(e)), Commodity Index Trust Shares (Nasdaq Rule 5711(f)), Commodity Futures Trust Shares (Nasdaq Rule 5711(g)), Partnership Units (Nasdaq Rule 5711(h)), Managed Trust Securities (Nasdaq Rule 5711(j)), Selected Equity-linked Debt Securities (“SEEDS”) (Nasdaq Rule 5715), Trust Issued Receipts (Nasdaq Rule 5720), Managed

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<sup>12</sup> 17 CFR 240.10A-3.

<sup>13</sup> Nasdaq IM-5620 also exempts securities listed pursuant to Nasdaq Rule 5730(a) (unless the listed security is a common stock or voting preferred stock equivalent).

<sup>14</sup> Proposed Nasdaq Rule 5615(a)(6)(B).

Fund Shares (Nasdaq Rule 5735)), and NextShares (Nasdaq Rule 5745).<sup>15</sup> Securities included in the proposed definition will be exempt from certain corporate governance requirements of Nasdaq Rule 5605 and the annual meeting requirements in Nasdaq Rule 5620(a) as described in this proposal. Nasdaq notes that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents.

Below are the securities included in the Proposed Definition, as well as a reference to the comparable Arca rules for listing similar securities that are entitled to similar exemptions as proposed herein:

<b>Product Type</b>	<b>Nasdaq Rule</b>	<b>Arca Rule</b>
Commodity Futures Trust Shares	5711(g)	8.204-E
Commodity Index Trust Shares	5711(f)	8.203-E
Commodity-Based Trust Shares	5711(d)	8.201-E
Commodity-Linked Securities <sup>16</sup>	5710(k)(ii)	5.2-E (j)(6)(B)(II)
Currency Trust Shares	5711(e)	8.202-E
Equity Gold Shares	5711(b)	5.2-E (j)(5)
Selected Equity-linked Debt Securities ("SEEDS")	5715	5.2-E (j)(2) (Equity Linked Notes)
Equity-Index Linked Securities	5710(k)(i)	5.2-E (j)(6)(B)(I)
Fixed-Income Linked Securities	5710(k)(iii)	5.2-E (j)(6)(B)(IV)
Futures-Linked Securities	5710(k)(iv)	5.2-E (j)(6)(B)(V)
Index Fund Shares (ETFs)	5705(b)	5.2-E (j)(3) (Investment Company Units)
Index-Linked Exchangeable Notes	5711(a)	5.2-E (j)(4)
Managed Fund Shares	5735	8.600-E
Managed Trust Securities	5711(j)	8.700-E
Multifactor Index-Linked Securities	5710(k)(v)	5.2-E (j)(6)(B)(VI)
NextShares	5745	N/A
Partnership Units	5711(h)	8.300-E
Portfolio Depositary Receipts	5705(a)	8.100-E

<sup>15</sup> NYSE Arca rules do not include an equivalent to Nasdaq Rule 5745 (NextShares).

<sup>16</sup> The Exchange notes that listing standards for both Commodity and Currency-Linked Securities are included within Nasdaq Rule 5710(k)(ii).

<b>Product Type</b>	<b>Nasdaq Rule</b>	<b>Arca Rule</b>
Trust Certificates	5711(c)	5.2-E.(j)(7)
Trust Issued Receipts	5720	8.200-E

The Exchange believes it is appropriate that Portfolio Depositary Receipts (Nasdaq Rule 5705(a)) and Index Fund Shares (Nasdaq Rule 5705(b)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because these securities are currently exempt from the provisions of Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), Nasdaq Rule 5610 (Code of Conduct), and Nasdaq Rule 5620(a) (Meetings of Shareholders).<sup>17</sup>

The Exchange also believes it is appropriate that Equity Index-Linked Securities (Nasdaq Rule 5710(k)(i)), Commodity-Linked Securities (Nasdaq Rule 5710(k)(ii)), Fixed Income Index-Linked Securities (Nasdaq Rule 5710(k)(iii)), Futures-Linked Securities (Nasdaq Rule 5710(k)(iv)), Multifactor Index-Linked Securities (Nasdaq Rule 5710(k)(v)), Index-Linked Exchangeable Notes (Nasdaq Rule 5711(a)) and SEEDS (Nasdaq Rule 5715) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because each are separate forms of unsecured debt of an issuer that is already subject to the corporate governance

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<sup>17</sup> See Nasdaq Rule 5615(a)(5) for the exemptions for Index Fund Shares and Nasdaq Rule 5615(a)(1) for the exemptions regarding Portfolio Depositary Receipts.

and annual meeting requirements of a national securities exchange.<sup>18</sup>

If the issuer is listed on Nasdaq, it is already subject to the requirements of the Nasdaq Rule 5600 Series. If the issuer is listed on the New York Stock Exchange LLC (“NYSE”), it is already subject to corporate governance standards that are substantially similar to Nasdaq’s. In addition, Nasdaq believes that it is appropriate to exempt these securities from the annual meeting requirements of Nasdaq Rule 5620(a) because the holders of these securities have economic interests and other limited rights that do not include voting rights. Nasdaq notes that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents. The Exchange believes that exempting these securities from the annual meeting requirements is consistent with rules of other exchanges that were previously approved by the Commission.<sup>19</sup>

In addition, while unlike traditional debt securities, these securities derive their value from the performance of an underlying index or reference asset, they retain many of the same characteristics as traditional debt securities<sup>20</sup> and, therefore, the Exchange believes it is consistent to treat them accordingly with regard to the corporate governance and annual meeting requirements.<sup>21</sup> The Exchange notes that including these securities in the Proposed Definition

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<sup>18</sup> Nasdaq Rule 5730(a)(2), with which securities listed pursuant to Nasdaq Rule 5710, 5711(a) and 5715 must comply, states, in part, the issuers common stock or voting preferred stock, or their equivalent “must be listed on the Nasdaq Global Market, Nasdaq Global Select Market or the New York Stock Exchange (NYSE) or be an affiliate of a Company listed on the Nasdaq Global Market, Nasdaq Global Select Market or the NYSE”.

<sup>19</sup> See Securities Exchange Act Release No. 57268 (February 4, 2008), 73 FR 7614 (February 8, 2008) (SR-Amex-2006-31).

<sup>20</sup> Like traditional debt securities, these securities are debt of the issuer and have a specific date of maturity.

<sup>21</sup> The Exchange notes that this is consistent with the treatment of “debt securities” under Arca Rule 5.3-E (Corporate Governance and Disclosure Policies).

and thereby creating exemptions from certain provisions of Nasdaq Rule 5615 and the annual meeting requirements of Nasdaq Rule 5620(a), is substantially similar to the Arca rules.<sup>22</sup>

Similarly, the Exchange believes it is appropriate that Equity Gold Shares (Nasdaq Rule 5711(b)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because like such classes of derivative securities, Equity Gold Shares are passive investment vehicles that hold a beneficial interest in a specified commodity trust. In addition, Equity Gold Shares are treated in a similar fashion to Index Fund Shares under the existing Nasdaq rules.<sup>23</sup> Therefore, the Exchange believes it is appropriate that Equity Gold Shares are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein as Index Fund Shares are already exempt from certain provisions of the Nasdaq Rule 5600 series.<sup>24</sup>

Additionally, the Exchange believes it is appropriate that Trust Certificates (Rule 5711(c)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because these securities represent an interest in a passive investment vehicle that are issued by entities created solely to issue securities and invest in the underlying index or reference assets. The trust does not have a board of directors and the holders of Trust Certificates have no voting rights, unless required under state law, with regard to corporate matters, including election of trustees. Therefore, the Exchange believes that Trust Certificates should be included in the Proposed Definition and should not be subject to the annual meeting requirements of Nasdaq Rule 5620(a). Nasdaq notes that these issuers may still be required to hold shareholder

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<sup>22</sup> See supra note 3.

<sup>23</sup> Rule 5711(b)(i) states that “while Equity Gold Shares are not technically Index Fund Shares and thus not are not covered by Nasdaq Rule 5705, all other rules that reference “Index Fund Shares” shall also apply to Equity Gold Shares.”

<sup>24</sup> See infra notes 29 and 30.

meetings, including special meetings, as required by federal or state law or their governing documents. The Exchange notes that including these securities in the Proposed Definition and thereby creating exemptions from certain provisions of Nasdaq Rule 5615 and the annual meeting requirements of Nasdaq Rule 5620(a), is substantially similar to the Arca rules.<sup>25</sup>

The Exchange also believes it is appropriate that Commodity-Based Trust Shares (Nasdaq Rule 5711(d)), Currency Trust Shares (Nasdaq Rule 5711(e)), Commodity Index Trust Shares (Nasdaq Rule 5711(f)), and Commodity Futures Trust Shares (Nasdaq Rule 5711(g)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because shares of these securities are passive investment vehicles that hold a beneficial interest in a specified commodity trust that is not managed like a corporation and does not have officers or a board of directors. These securities are already exempt from Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), and Nasdaq Rule 5610 (Code of Conduct).<sup>26</sup> In addition, while shareholders may have limited voting rights in certain circumstances, they do not have the right to elect directors. Therefore, given the limited voting rights, lack of directors or officers, and the passive nature of the trust, the Exchange believes these securities should not be subject to the annual meeting requirements of Nasdaq Rule 5620(a). Nasdaq notes that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents. The

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<sup>25</sup> See supra note 3.

<sup>26</sup> The Exchange interprets these securities to be currently exempt pursuant to Nasdaq Rule 5615(a)(1) (Asset-backed Issuer and Other Passive Issuers).

Exchange believes that these changes are consistent with rules of other exchanges that were previously approved by the Commission.<sup>27</sup>

The Exchange also believes that it is appropriate that Partnership Units (Nasdaq Rule 5711(h)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because Partnership Units are passive investment vehicles that hold a beneficial interest in a specified partnership that is not managed like a corporation and does not have a board of directors. In addition, the Exchange believes Partnership Units should not be subject to the annual meeting requirements of Nasdaq Rule 5620(a) because holders have limited voting rights and the general partner oversees the operation of the partnership. Nasdaq notes that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents. The Exchange believes that these changes are consistent with rules of other exchanges that were previously approved by the Commission.<sup>28</sup>

Nasdaq believes it is appropriate that Trust Issued Receipts are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because Trust Issued Receipts are passive investment vehicles that hold a beneficial interest in a specified partnership that is not managed like a corporation and does not have a board of directors. In addition, the Exchange believes that Trust Issued Receipts should not be subject to the annual meeting requirements of Nasdaq Rule 5620(a) because these securities are currently exempt from this rule.<sup>29</sup>

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<sup>27</sup> See supra note 19.

<sup>28</sup> Id.

<sup>29</sup> See Nasdaq IM-5620.

Nasdaq believes it is appropriate that Managed Fund Shares (Nasdaq Rule 5735) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because Managed Fund Shares are currently exempt from the provisions of Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), and Nasdaq Rule 5610 (Code of Conduct).<sup>30</sup> In addition, Nasdaq believes that it is appropriate to exempt these securities from the annual meeting requirements of Nasdaq Rule 5620(a) because like Index Fund Shares (which are currently provided an exemption from the annual meeting requirements of Nasdaq Rule 5620(a)),<sup>31</sup> Managed Fund Shares are securities issued by an open-end investment company registered under the 1940 Act that are available for creation and redemption on a continuous basis, and require dissemination of an intraday portfolio value. These requirements provide important investor protections and ensure that the net asset value and the market price remain closely tied to one another while maintaining a liquid market for the security. These protections, along with the disclosure documents regularly received by investors, allow shareholders of Managed Fund Shares to value their holdings on an ongoing basis and lessen the need for shareholders to directly deal with management at an annual meeting. Therefore, Nasdaq further believes it is appropriate that Managed Fund Shares be afforded the proposed exemptions to the annual meeting requirements of Nasdaq Rule 5620(a). Nasdaq notes

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<sup>30</sup> See Nasdaq Rule 5615(a)(5).

<sup>31</sup> See Securities Exchange Act Release No. 53578 (March 30, 2006), 71 FR 17532 (April 6, 2006) (SR-NASD-2005-073). As noted in the filing, Nasdaq believes these exchange-traded funds are generally passive investment vehicles that seek to match the performance of an index and must obtain an exemptive order from the Commission before they offer securities. As a result, Nasdaq notes that the operations of the issuers of these securities are circumscribed by numerous representations and conditions of the applicable exemptive orders, and that the issuers of these securities do not typically experience the need for operational or other changes requiring a shareholder vote, and, by extension a shareholder meeting.

that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents. As stated in a previous Commission approval order,<sup>32</sup> exchange-traded funds are registered under, and remain subject to, the Investment Company Act of 1940 (“Investment Company Act”), which imposes various shareholder-voting requirements that may be applicable to such funds.<sup>33</sup>

The Exchange also believes it is appropriate that NextShares (Nasdaq Rule 5745) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because NextShares are already afforded exemptions from certain portions of the Nasdaq Rule 5600 Series.<sup>34</sup> In addition, Nasdaq believes it is appropriate to provide NextShares an exemption from the annual meeting requirements in Nasdaq Rule 5620(a) because like Index Fund Shares (which are already provided an exemption from Nasdaq Rule 5620(a)),<sup>35</sup> NextShares are securities issued by an open-end investment company registered under the 1940 Act that are available for creation and redemption on a continuous basis, and require dissemination of an intraday portfolio value. These requirements provide important investor protections and ensure that the net asset value and the market price remain closely tied to one another while maintaining a liquid market for the security. These protections, along with the disclosure documents regularly received by investors, allow shareholders of NextShares to value their holdings on an ongoing basis and lessen the need for shareholders of NextShares to deal directly with management at an annual meeting. Therefore, Nasdaq believes it is appropriate that NextShares be afforded the

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<sup>32</sup> See Securities Exchange Act Release No. 53578 (March 30, 2006), 71 FR 17532 (April 6, 2006) (SR-NASD-2005-073).

<sup>33</sup> See e.g., Section 16 of the Investment Company Act, which requires, among others, an investment company’s initial board of directors to be elected by the shareholders at an annual or special meeting. 15 U.S.C. 80a-16(a).

<sup>34</sup> See supra note 30.

<sup>35</sup> See supra note 29.

proposed exemptions from certain provisions of Nasdaq Rule 5615 and the annual meeting requirements of Nasdaq Rule 5620(a). Nasdaq notes that these issuers may still be required to hold shareholder meetings, including special meetings, as required by federal or state law or their governing documents.

The Exchange specifically does not propose that securities listed pursuant to Nasdaq Rule 5730 (Listing Requirements for Securities Not Otherwise Specified (Other Securities)) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein because the characteristics of these securities are unknown and therefore the Exchange cannot determine whether allowing exemptions to the Rule 5600 Series is appropriate. In addition, the Exchange does not propose that Trust Units (Nasdaq Rule 5711(i)), Currency Warrants (Nasdaq Rule 5711(k)), Alpha Index-Linked Securities (Nasdaq Rule 5712), Paired Class Shares (Nasdaq Rule 5713) or Index Warrants (Nasdaq Rule 5725) are included in the Proposed Definition and, therefore, entitled to the exemptions proposed herein, as the Exchange does not anticipate listing such securities in the near future.<sup>36</sup> The proposed rule language will also clearly indicate that products included in the Proposed Definition are subject to certain exemptions under the Nasdaq Rule 5600 Series.

As noted above, Nasdaq Rule 5615 sets forth exemptions from the corporate governance requirements in the Nasdaq Rule 5600 series for certain companies. For example, Nasdaq Rule 5615(a)(1) exempts asset-backed issuers and other passive issuers from the requirements of Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations),

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<sup>36</sup> Should the Exchange list Trust Units, Currency Warrants, Alpha Index-Linked Securities Paired Class Shares or Index Warrants in the future, it may consider whether to amend its rules at that time to allow for certain corporate governance exclusions applicable to such classes of securities.

and Nasdaq Rule 5610 (Code of Conduct).<sup>37</sup>

The Exchange proposes to amend Nasdaq Rule 5615(a)(5) by removing references to Index Fund Shares, Managed Fund Shares, and NextShares and including these securities in the Proposed Definition. These changes will conform the exemptions from the Nasdaq Rule 5600 Series that are afforded to management investment companies<sup>38</sup> with the exemptions under the Arca Rules for Index Fund Shares and Managed Fund Shares.<sup>39</sup> The Exchange believes that these changes are consistent with those previously approved by the Commission.<sup>40</sup>

The Exchange proposes to add new Nasdaq Rule 5615(a)(6). Nasdaq Rule 5615(a)(6)(A) will provide that issuers listing only non-voting preferred securities, debt securities, or Derivative Securities are exempt from Nasdaq Rule 5605(b) (Independent Directors), Nasdaq Rule 5605(c) (Audit Committee Requirements, except for the applicable provisions of SEC Rule 10A-3 as discussed below), Nasdaq Rule 5605(d) (Compensation Committee Requirements), Nasdaq Rule 5605(e) (Independent Director Oversight of Director Nominations), Nasdaq Rule 5610 (Code of Conduct), and Nasdaq Rule 5620(a) (Meetings of Shareholders).<sup>41</sup> However, Nasdaq Rule

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<sup>37</sup> Nasdaq Rule 5615(a)(1) also provides exemptions for Nasdaq Rule 5605(c) (Audit Committee) and Nasdaq Rule 5615(c) (Controlled Company Exemption). See also note 12 and accompanying text for descriptions of additional exemptions provided under Nasdaq Rule 5615(a)(5).

<sup>38</sup> The Exchange notes that business development companies (as defined in Nasdaq IM-5615-4) will remain subject to all of the requirements of Nasdaq Rule 5600.

<sup>39</sup> See supra note 3.

<sup>40</sup> See Securities Exchange Act Release No. 49810 (June 4, 2004), 69 FR 32647 (June 10, 2004) (SR-PCX-2003-35).

<sup>41</sup> Nasdaq notes that the rule proposal for the recently approved Listing Rule 5702 (Corporate Bonds) included plans to seek exemptions to certain requirements of the Nasdaq Rule 5600 Series. Nasdaq would consider Corporate Bonds to be “debt securities” for the purpose of the exemptions proposed herein. Similar to Linked Securities, Corporate Bonds are non-convertible debt of an issuer and have to have a class of equity listed on an exchange. In the case of Corporate Bonds, the equity must be listed on Nasdaq, NYSE American or NYSE. In addition, Nasdaq does not propose to

5615(a)(6)(A) will continue to require such companies to comply with the requirements of Nasdaq Rule 5625, pursuant to which an issuer will provide Nasdaq with prompt notification after an executive officer of the company becomes aware of any noncompliance by the company with the requirements of the Nasdaq Rule 5600 Series.

Consistent with the existing exemptions available for certain other securities listed pursuant to the Nasdaq Rule 5700 Series, these issuers must comply with the applicable provisions of SEC Rule 10A-3<sup>42</sup> and the proposed rule will specifically state that requirement.<sup>43</sup> The proposed rule thereby applies the requirements of SEC Rule 10A-3 to the issuer's audit committee. As noted above, the proposed rule also imposes on the issuer the obligation to promptly notify Nasdaq after an executive officer of the issuer becomes aware of any noncompliance by the issuer with the requirements of the Nasdaq Rule 5600 series, including noncompliance with the audit committee provisions that are required by SEC Rule 10A-3 and which are set forth in Nasdaq Rule 5605(c).

This proposed change will conform Nasdaq's treatment of these issuers with that of existing Arca requirements.<sup>44</sup> The proposed rule will also state that an issuer that has non-voting preferred securities, debt securities, or Derivative Securities listed on the Exchange that also lists its common stock or voting preferred stock or their equivalent on Nasdaq will be subject to all

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exempt Corporate Bonds from Nasdaq Rule 5630 (Review of Related Party Exemptions), Nasdaq Rule 5635 (Shareholder Approval), or Nasdaq Rule 5640 (Voting Rights) as stated in the rule proposal for Nasdaq Rule 5702. (See Securities Exchange Act Release No. 84575 (November 13, 2018), 83 FR 58309 (November 19, 2018) (SR-NASDAQ-2018-070)).

<sup>42</sup> 17 CFR 240.10A-3.

<sup>46</sup> Nasdaq Rule 5615(a)(5) states, in part, "...management investment companies that issue Index Fund Shares, Managed Fund Shares, and NextShares, as defined in Rules 5705(b), 5735, and 5745 are exempt from the Audit Committee requirements set forth in Rule 5605(c), except for the applicable requirements of SEC Rule 10A-3."

<sup>44</sup> See supra note 3.

the requirements of the Nasdaq 5600 Rule Series. Nasdaq also proposes to add the Proposed Definition as Nasdaq Rule 5615(a)(6)(B).

Finally, the Exchange proposes to amend Nasdaq IM-5620 to amend the annual meeting requirements of Nasdaq Rule 5620(a) to clarify that issuers of only non-voting preferred securities, debt securities or Derivative Securities<sup>45</sup> are not subject to the rule. The Exchange believes that the proposed amendment is appropriate because the holders of non-voting preferred securities, debt securities or Derivative Securities do not have voting rights with respect to the election of directors except in very limited circumstances as required by federal or state law or their governing documents.<sup>46</sup> The existing provisions of Nasdaq IM-5620 already provide exemptions for securities that are the same or similar to the securities proposed for inclusion in the Proposed Definition.<sup>47</sup> The rule will continue to state that if the Company also lists common stock or voting preferred stock, or their equivalent, on Nasdaq, the Company will be subject to the annual meeting requirements of Nasdaq Rule 5620.<sup>48</sup> The Exchange notes that the proposed

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<sup>45</sup> The Exchange is proposing to expand the list of products that are exempt from the annual meeting requirements of Nasdaq Rule 5620(a). The proposed list of products consists of Portfolio Depositary Receipts and Index Fund Shares (Rule 5705); Equity Index-Linked Securities (Rule 5710(k)(i)), Commodity-Linked Securities (Rule 5710(k)(ii)), Fixed Income Index-Linked Securities (5710(k)(iii)), Futures-Linked Securities (5710(k)(iv)), Multifactor Index-Linked Securities (5710(k)(v)), Index-Linked Exchangeable Notes (Rule 5711(a)), Equity Gold Shares (Rule 5711(b)), Trust Certificates (Rule 5711(c)), Commodity-Based Trust Shares (Rule 5711(d)), Currency Trust Shares (Rule 5711(e)), Commodity Index Trust Shares (Rule 5711(f)), Commodity Futures Trust Shares (Rule 5711(g)), Partnership Units (Rule 5711(h)), Managed Trust Securities (Rule 5711(j)), SEEDS (Rule 5715), Trust Issued Receipts (Rule 5720), Managed Fund Shares (Rule 5735), and NextShares (Rule 5745). Portfolio Depositary Receipts, Index Fund Shares and Trust Issued Receipts are currently excluded from the annual meeting requirement in Nasdaq Rule 5620(a).

<sup>46</sup> See supra discussion regarding Derivative Securities, pp. 7 – 17.

<sup>47</sup> See supra note 29.

<sup>48</sup> Nasdaq notes that closed-end management investment companies will still be subject to the annual meeting requirements of Nasdaq Rule 5620.

changes are substantially similar to Arca requirements.<sup>49</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>50</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>51</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster competition and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that the proposed amendments to: (i) amend Nasdaq Rule 5615; (ii) add a definition for “Derivative Securities” applicable only to the Nasdaq Rule 5600 Series; (iii) detail the exemptions available to issuers that only list non-voting preferred securities, debt securities, and Derivative Securities; and (iv) amend Nasdaq IM-5620 to update the exemptions from the annual meeting requirements to include issuers that only list non-voting preferred securities, debt securities, and Derivative Securities, are consistent with the protection of investors.

Nasdaq believes that the proposed exemptions for issuers of only non-voting preferred stock, debt securities and Derivative Securities are consistent with the protection of investors, as the holders of these securities do not have voting rights with respect to the election of directors, except in very limited circumstances, as required by state or federal law or their governing

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<sup>49</sup> See supra note 3.

<sup>50</sup> 15 U.S.C. 78f(b).

<sup>51</sup> 15 U.S.C. 78f(b)(5).

documents. Moreover, such securities are generally issued by an entity that is either (i) structured solely as vehicles for the issuance of non-voting or derivative securities, or (ii) issued by an operating company primarily listed on a national securities exchange and therefore subject to the full corporate governance and annual meeting requirements of that exchange.<sup>52</sup>

Additionally, the net asset value of Derivative Securities that the Exchange proposes to exclude from its annual meeting requirement is determined by the market price of each fund's underlying securities or other reference asset. Shareholders of such securities products listed on the Exchange receive regular disclosure documents describing the pricing mechanism for their securities and detailing how they can value their holdings. Accordingly, holders of such securities can value their investment on an ongoing basis. Because of these factors, Nasdaq believes there is a reduced need for shareholders to engage with management of issuers of these securities and thus no need for the issuers of such securities to hold annual shareholder meetings absent the existence of other listed securities with director election voting rights. Further, although the Exchange proposes to exclude issuers of such securities from holding an annual meeting, such issuers may still be required to hold special meetings as required by state or federal law or their governing documents. The Exchange believes that issuers of only non-voting preferred stock, debt securities and Derivative Securities are excluded from complying with substantially similar requirements on other national securities exchanges.<sup>53</sup>

An issuer that has non-voting preferred stock, debt securities and Derivative Securities listed on the Exchange that also lists the issuers common stock or voting preferred stock or their equivalent on Nasdaq will be subject to all the requirements of the Nasdaq Rule 5600 Series.

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<sup>52</sup> See supra note 18.

<sup>53</sup> The Proposed Definition is substantially similar to securities deemed to be “derivative and special purpose securities” pursuant to Arca Rule 5.3-E.

Also, the Exchange notes that although NextShares (Nasdaq Rule 5745) are included in the new definition for “Derivative Securities,” Arca rules do not include an equivalent product. However, Nasdaq believes that the inclusion of NextShares in the Proposed Definition is consistent with the protection of investors because like Index Fund Shares (which are currently exempt from many of the corporate governance and annual meeting requirements of the Nasdaq 5600 Rule Series),<sup>54</sup> NextShares are securities issued by an open-end investment company registered under the 1940 Act that are available for creation and redemption on a continuous basis, and require dissemination of an intraday portfolio value. In addition, NextShares are already exempt from portions of the Nasdaq Rule 5600 Series as well as subject to the same filing and disclosure requirements as Index Fund Shares.

Nasdaq also believes that the addition of a definition for “Derivative Securities” applicable to the Nasdaq Rule 5600 Series will improve the clarity of the rules and reduce possible investor confusion.

For the reasons stated herein, the Exchange believes the proposed amendments provide appropriate levels of investor protections, consistent with the investor protection requirement of Section 6(b)(5), and would conform the listing standards across exchanges resulting in enhanced competition among markets and removing an impediment to a free and open market and national market system.

**B. Self-Regulatory Organization’s Statement on Burden on Competition**

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as amended. Instead, Nasdaq believes that the proposed rule change to conform Nasdaq Rule 5615(a) and

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<sup>54</sup> See supra notes 29 and 30.

Nasdaq Rule 5620(a) so that they are substantially similar to Arca Rule 5.3-E may enhance competition since Nasdaq and Arca will have substantially similar listing requirements for these issuers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>55</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>56</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>55</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>56</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2019-039 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2019-039. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-039, and should be submitted on or before **[INSERT DATE 21 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>57</sup>

**Eduardo A. Aleman,**

*Deputy Secretary.*

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<sup>57</sup> 17 CFR 200.30-3(a)(12).

